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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA, *Appellant*
V.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL., *Appellee*

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *Appellant*
V.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL., *Appellee*

On Appeal From The United States District Court
For The Western District Of Texas

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA SUPPORTING AFFIRMANCE

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation designated as a public interest law firm under regulations of the Internal Revenue Service. It is located on the campus of the South Texas Law School in Houston and has particular expertise in matters of economic policy, public policy, and constitutional law. LFA does not accept private fees but is supported by the law school and by private contributions. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

LFA has long had an interest in cases involving the federal-state balance. It has appeared as amicus curiae in such cases in this honorable Supreme Court, in the federal courts of appeal and district courts, and in the courts of the several states. It has

supported the exercise of federal authority in some cases, including authority over interstate commerce, national defense, and civil rights enforcement. In some cases, it has supported the interests of state or local governments. It has provided legal representation to states, bar associations, local government units, and other governmental entities in some such cases, as well as appearing in its own name.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision in Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979), provides an objective test for distinguishing "integral" or "traditional" state functions. The Amersbach test accurately reflects existing decisions. It is consistent with longstanding concepts of economics and political science, identifies those state functions in which recognition of sovereignty is most important, and is the only such test that has achieved wide acceptance. The purpose of this brief is to suggest the appropriateness of the Amersbach test as a means of resolving the case at bar and as a means of preserving consistency in this area of constitutional law.

ARGUMENT

THE TEST OF AMERSBACH V. CITY OF CLEVELAND, 598 F.2d 1033 (6th Cir. 1979), IS THE MOST APPROPRIATE MEANS FOR DISCERNING "INTEGRAL" OR "TRADITIONAL" STATE FUNCTIONS.

In Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979), the court set out a test for "integral" or "traditional" state functions, as follows:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider

> of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community wide need for the service or activity.

The court deduced this test by "analyzing the services and activities which the [Supreme] Court characterized [in National League of Cities] as typical of those performed by governments." Id.

This Amersbach test has since been widely accepted, and it is submitted that it is an appropriate means for resolving the issue at hand.

A. The Amersbach test accurately reflects existing decisions distinguishing functions that are "integral" or "traditional" from those that are not.

The Amersbach test provides objective criteria for distinguishing fire, police, sanitation, or hospital activities (which have been held to be within the rule of National League of Cities)[1] from activities, such as selling bottled water or producing oil and gas, which have not.[2] Amersbach accurately reflects these existing categorizations because it was based on a careful analysis of precisely those categorizations.

B. The Amersbach test is consistent with long-standing, generally accepted concepts of economics and political science.

An economist or political scientist would immediately recognize the concept embodied in the Amersbach test. In nontechnical terms, the Amersbach criteria describe what these scholars would call a "public good." Harvard economist Robert

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1 National League of Cities v. Usery, 426 U.S. 833, 851-52 (1976).

2 New York v. United States, 326 U.S. 572 (1946); Public Service Co. v. FERC, 587 F.2d 716 (5th Cir. 1979).

Dorfman describes public goods as "Goods that cannot be assigned to individual consumers or firms. The welfares of several (or all) consumers or firms are affected jointly by the total amount of public goods in the community." [3] Former Professor (now Circuit Judge) Richard Posner provides a similar definition, stressing that the good cannot be accurately priced in market terms because its use by anyone benefits the community as a whole. [4] Examples of "important" public enterprises given by Economist Richard Caves include the following: ". . . the postal service, water and sewer services, [and] *local transportation* . . . ." [5]

In this connection, it should be added that the Amersbach test provides a complete answer to the argument of Appellant Garcia, whose brief raises the spectre of a "state take-over from the private sector of the provision of goods and services" if States can operate government enterprises "free of the federally-imposed costs." [6] Public goods are precisely those that *cannot* be

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3 R. DORFMAN, PRICES AND MARKETS 195 (3d ed. 1978).

4 R. POSNER, ECONOMIC ANALYSIS OF LAW 351 (2d ed. 1977).

5 R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT AND PERFORMANCE 113 (5th ed. 1982).

6 Brief of Appellant Garcia at 13. There are several reasons why Garcia's arguments are unpersuasive. In the first place, Garcia assumes government would use "eminent domain." Id. But to do so, it would be required to pay full compensation at market rates. That payment is usually impractical (and was difficult for local governments even in the transit situation). Secondly, the efficiency losses attributable to substituting political decisionmaking for market information are substantial and would make such "takeovers" impractical. R. DORFMAN, supra note 5, at 174. Finally, Garcia's argument that there would be a "powerful incentive" for such "takeovers" ignores the reality that covered government services involve losses, not profits, requiring large taxpayer subsidies.

In fact, application of regulations designed for the private sector indiscriminately to subsidized government services has the economic effect of decreasing the ability of government to provide those services at the proper level in a mixed economy. See part D of this brief, below.

efficiently provided by private enterprise, and hence the Garcia argument is ill-considered.

Amicus curiae recognizes that the concepts of economics and political science cannot always be read directly into the law. However, the congruence of the Amersbach test with traditional scholarly criteria for recognizing "integral" governmental functions, and its ability to avoid completely the issues raised by Appellants, is an indication of its soundness.

C. The Amersbach test is the only approach that has gained widespread acceptance among courts considering the problem at issue.

The Amersbach test has been repeatedly cited by both district and appellate courts in several circuits. These courts have found that Amersbach provides an accurate, objective means for solving the problem at hand. [7]

D. The Amersbach test identifies those functions in which States most need recognition of their sovereignty.

A state may not need recognition of its sovereignty in matters such as sale of bottled water or oil and gas production. But governmental services that are provided to the public at large subsidies, requiring that all members of the public be served without regard to the difficulty of such service, at all hours and on holidays, and in spite of emergencies, require the state to function with some breathing space for its sovereign capacity. In terms of Appellant Garcia's economic arguments, the Amersbach test accurately and reliably identifies governmental services of this

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7 E.g., Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841 (1st Cir. 1982) (authority planning mass transit system held an integral state function, following Amersbach); Woods v. Homes & Structures of Pittsburg, Kansas, Inc., 489 F. Supp. 1296 (D. Kan. 1980) (private development bonds held not an integral state function, following Amersbach).

nature. A transit, fire, or police service, for example, cannot take its necessary place in the provision of goods and services if it is subjected to regulation suited to the private market, making it more difficult for it to operate during the "graveyard" shift. [8]

CONCLUSION

The Amersbach test affords a reliable, realistic, and consistent means for recognizing protected governmental services. It is congruent with traditional scholarship, has been accepted by both trial and appellate courts facing diverse federalism issues, and identifies precisely those services for which state sovereignty most requires recognition.

Under the Amersbach test, local public transit is a clearly protected government service. The opinion of the district court in this regard is well reasoned and should be affirmed. [9]

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8 Government enterprise in these areas cannot operate as efficiently, because it is deprived of the informational input of the market and must rely instead on political choices. R. DORFMAN, supra note 5, at 174.

9 Public transit benefits the community as a whole by eliminating pollution, alleviating congestion, conserving energy, and stimulating economic development. It cannot be priced at its true cost to each rider (because then, the rational driver would take his car more cheaply, leaving it to others to take transit and alleviate congestion—a formula for failure of transit). Riders therefore pay only a small fraction of the true cost. It is clear that government does not operate transit for pecuniary gain, but rather for public service and community wide benefit. 557 F. Supp. at 453.

Finally, government is particularly well suited for the purpose. It provides most local public transit. As the district court pointed out, 557 F. Supp. 454, counting the number of transit services is misleading. In 1978, governmentally operated public transit accounted for 91 per cent of vehicle miles, 91 per cent of linked passenger trips, 90 per cent of mass transit revenues, and 87 per cent of transit vehicles.

Thus the Amersbach test strongly supports the conclusion that governmentally provided mass transit is an "integral" function of state and local government. 557 F. Supp. 454.

Respectfully submitted,

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